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Precluding bad evidence in a spine-injury case

USING MOTIONS IN LIMINE TO KEEP OUT DEFENSE EVIDENCE THAT LACKS PROBATIVE VALUE BUT MUDDIES THE WATERS – SUB ROSA PHOTOS AND VIDEOS

The power of the pen cannot be overstated. The outcome of motions in limine sets the stage for the entire trial. And when presenting a spine-injury case to a jury, there is strength in simplicity. Respect the judge and jury's time, call only necessary witnesses, cross-examine on only the big points, etc. Confusion, on the other hand, is often the defense's best weapon. Therefore, in preparing your case for trial, you must try to preclude the introduction of bad evidence – evidence that lacks probative value and is there merely to muddy the waters. Consider this article a toolbox from which to build or bolster your motions in limine.

Motion in limine basics

Motions in limine serve a powerful purpose: precluding improper evidence before an attempt to introduce it at trial is even made. But they should not be abused. In litigation, be vigilant about identifying the direction your opponent's case is heading. Identify the key evidence they seek to use, and, if it is improper under the rules of evidence or other authority, move to preclude it from trial. Carefully deciding which motions to file – and setting aside other, less important motions – is a way of emphasizing the important issues. If you file 30 motions in limine, you are diluting those key points.

A motion in limine must identify *evidence* sought to be precluded. (*Kelly v. New W. Fed. Sav.* (1996) 49 Cal.App.4th 659, 669.) Pay careful attention to your courtroom rules – some judges require identification of the exact exhibit number, or similar identifying marker, for the challenged evidence. Courtroom rules will also guide you on the timing of bringing such motions. For example, certain venues require motions in limine to be filed in accordance with California Code of Civil Procedure section 1005 (i.e., as a regularly noticed motion).

Always meet and confer before preparing and filing your motions in limine. Not only is this generally a requirement, but it is advisable. You may think a certain item of evidence is contentious, when a simple meeting and explanation of why that evidence should be precluded is enough to get agreement from the other side. At the very least, you will learn their counterpoints and can affirmatively address those points in your motion. Anticipating and explaining away a defense is an excellent way of maintaining the supremacy of your position.

Fast but efficient writing

Build out templates. This author generally suggests working from a new pleading when drafting motions during litigation. This helps you to craft your argument to the exact issue on hand. Motions in limine, however, are the exception. If you build a solid template which can be tweaked depending on the facts of your case, then you are setting yourself up for success at trial. This is because trial is a balancing act – you are developing trial documents with the other side, coordinating with experts and other witnesses, and preparing your direct and cross examinations. If you are a solo practitioner, and do not have the benefit of a trial law-and-motion team, then templates are a necessity. The next section will provide some solid arguments to get you started.

Unfortunately, there are occasions when a unique issue comes up and you need to address it from scratch. Utilize the Evidence Code. Do not overcomplicate the issue. Often, a unique problem can be precluded with citation merely to Evidence Code sections 350 (relevance) and 352 (prejudicial, confusing, or misleading evidence). Establish the basic theory regarding the interplay of these two sections, then use reasoning and persuasive writing techniques to show why your position is correct. Do not be afraid to submit a one-to-two-page motion in limine if your argument is strong and straightforward.

Sometimes a writer can get stuck on the formalities of a motion. Remember that the judge understands your case (assuming you have already submitted a detailed trial brief and/or you have been assigned to that particular department throughout litigation). Thus, get right to the heart of the issue presented. In the introduction, or in the first paragraph if you are not creating separate sections (which is okay), explain (1) which particular piece of evidence you want excluded, (2) why you anticipate the evidence to come into trial (e.g., a particular defense expert opines on that evidence), (3) why the evidence

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2023

must be precluded under the law, and (4) why your client will be unfairly prejudiced absent preclusion. Then expand on these concepts and conclude your motion.

Common motions in limine for spine-injury cases

A spine-injury case will nearly always be a dispute about causation and the extent of damages. Even if liability is admitted (and unless the admission spans to causation), these two elements will be at the forefront of trial. The following are relevant authorities on these topics.

Sub rosa video

If your client has a valuable claim, chances are the other side has hired a private investigator to take surveillance video of them. Chances are equally as great that they failed to disclose this evidence in discovery – citing the attorney work-product doctrine. However, this doctrine is inapplicable to surveillance video. The leading case on discoverability of surveillance footage is *Suezaki v. Superior Court of Santa Clara Cty.* (1962) 58 Cal.2d 166. For over 50 years, *Suezaki* has gone unchallenged in holding that surveillance is not a privileged attorney-client communication:

> In the instant case, the trial court was of the opinion that all photographs taken by an investigator and transmitted to an attorney for use on trial are privileged under the rule announced in that case. This view is, perhaps, shared by others. If *Holm* is susceptible to that interpretation it should be overruled on this point. A picture of a public bus on a public street is not a confidential communication. Therefore, insofar as the *Holm* case may be interpreted to hold that any photograph taken for the purpose of litigation and transmitted to an attorney is privileged, per se, it is disapproved.

(*Suezaki*, 58 Cal.2d at p. 176.) Nor is surveillance protected as attorney work product:

> The films [of the plaintiff] are not a graphic representation of the defendants, their activities, their mental impressions, anything within their knowledge, or of anything owned by them.

(*Id.*, at p. 177.)

The discoverability of such evidence is so proper, in fact, that the Judicial Council formulated form interrogatories aimed squarely at its disclosure (Form Interrogatories 13.1 and 13.2 in the Judicial Council forms).

Moreover, a litigant cannot convert the shield of privilege into a sword to deny discovery yet self-servingly waive that claim when needed at trial to introduce the evidence about which the party would not permit discovery. (See, e.g., *Dwer v. Crocker National Bank* (1987) 194 Cal.App.3d 1418, 1432 [upholding order excluding admission or use of evidence and documents to which party asserted privilege objections during discovery]; *Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.* (1993) 12 Cal.App.4th 501, 569 ["A party cannot have it both ways: He or she cannot assert the privilege in discovery and then (having as a practical matter denied the adversary's legitimate discovery rights) waive the privilege and offer the proof at trial without taking or suffering steps appropriate to cure the prejudice to the adversary"].)

Finally, a court has the power to bar testimony and evidence that was "excluded from an answer to an interrogatory." (*Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270, 273.) The *Thoren* court went on to note that "one of the principle purposes of the Civil Discovery Act is to do away with 'the sporting theory of litigation – namely, surprise at trial.'" (*Id.*, at 274.)

With these principles in mind, it is often best to compel such surveillance before trial. This allows you ample time to obtain all raw video (rather than the edited version that makes your client look bad, with video of them in pain being cut from the final version) and to depose the private investigator. But if this is not practical in your particular case, you can move in limine to exclude under the *Dwer* and *Xebec* cases, as well as Evidence Code section 352.

Attorney-referred treatment and "lien treatment"

Injured plaintiffs come from all stages of life with different socioeconomic backgrounds and varying means. Some are injured while covered through excellent health insurance, and others have no insurance on which to rely. This does not mean that any one particular plaintiff is less deserving of care. Therefore, personal-injury attorneys will occasionally arrange for a plaintiff to visit healthcare providers who are willing to treat on a lien, i.e., agreeing to forgo payment until resolution of a third-party claim. The defense may seize on this fact to argue that your client's injuries are less believable, even though the provider is the sole person making medical determinations for the plaintiff.

Evidence Code section 350 provides that only relevant evidence is admissible. Relevant evidence is defined as "having any tendency to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Kelly* (1992) 1 Cal.4th 495, 523.) Any mention that a plaintiff was referred to a doctor by an attorney is simply irrelevant. The issues in a spine-injury case are the defendant's negligence and causation of the plaintiff's injuries. Attorney referrals do not have a "tendency to prove or disprove any disputed fact that is of consequence to the determination of the action." Any mention of this would only be made to inflame the prejudices of a jury, and is thus inadmissible under Evidence Code section 352. Such evidence is further improper under sections 786 and 788 of the Evidence Code, as it constitutes character evidence, which is intended to attack the credibility of the plaintiff.

Moreover, information within the scope of the attorney-client privilege is absolutely protected from disclosure unless waived. This means the court cannot "weigh" or "balance" the privilege against the need for the information: "As a general rule, privileged communications are protected regardless of their relevancy to the issues in the litigation, and despite

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2023

any private or public interest in disclosure." (*Rittenhouse v. Sup.Ct. (Board of Trustees of Leland Stanford Jr. Univ.)* (1991) 235 Cal.App.3d 1584, 1590.) Therefore, the fact that a plaintiff was referred to a healthcare provider is a privileged matter that should not be compelled in litigation, let alone presented at trial.

Whether a plaintiff's treatment is held on lien is also irrelevant, and its presentation at trial is against public policy. The seminal case *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, is on point. In *Pebley*, a plaintiff who was insured through a health maintenance organization (HMO) was catastrophically injured when his motor home was rear-ended by a commercial vehicle. Due to the nature of his injuries, the plaintiff chose to treat outside of his network via lien. In holding that the trial court did not abuse its discretion by excluding evidence of the plaintiff's health insurance, the *Pebley* court noted that the plaintiff "had the *right* to treat outside of his plan." (*Id.*, at 1277, emphasis added.) The Court reasoned that, when plaintiffs face a sudden and catastrophic injury, they should not be bound by the healthcare they chose at a time when they were healthy and required little care. Following from this public policy, evidence that a plaintiff treated through a lien should be precluded from trials. After all, a plaintiff is not truly free to seek the best care if that care is then attacked because payment for it has been deferred.

Reimbursement rates

Billing experts who are hired to reduce a plaintiff's medical specials often do so through reference to insurance-reimbursement rates, Medicare rates, etc. This is improper if the plaintiff's care was not paid by those sources. While the Court in *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, held that the measure of damages should turn on a "wide-ranging inquiry" into the reasonableness of charges, this does not mean the floodgates are opened for irrelevant rates to be presented at trial.

Instead, the inquiry should be made pursuant to the category of the payer, i.e., the particular plaintiff. (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 562; see also *Bermudez*, 237 Cal.App.4th at p. 1330 ["[The defendant] is correct that the concept of market or exchange value was endorsed by *Howell* as the proper way to think about the "reasonable value" of medical services. But she is incorrect to the extent she suggests (1) Bermudez is necessarily in the same market as insured health care recipients or wealthy health care recipients who can pay cash; or (2) *Howell* prescribes a particular method for determining the "reasonable value" of medical services"].)

Pebley is again on point: "[W]here . . . the plaintiff chooses to be treated outside the available insurance plan, the plaintiff is in the same position as an uninsured plaintiff and should be classified as such under the law." (*Pebley*, 22 Cal.App.5th at p. 1277-78.) Insurance-reimbursement rates are unrelated to treatment held on a lien basis, and thus do not aid in proving or disproving the reasonableness of the lien rates. Such rates are properly excluded under Evidence Code section 352 and *Howell*.

Alternate causation

A plaintiff has the burden of proving a prima facie case. An allegation of alternate causation, however, must be proven by the defense. (*Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 33; *Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 368 ["Placing the burden on defendant to prove fault as to nonparty tortfeasors is not unjustified or unduly onerous"].) Alternate causation comes in many forms, e.g., that the injuries were caused by a prior crash, a subsequent fall, work-related injuries, etc. But the law does not allow the defense to throw these speculative matters at the wall to see what sticks.

Unfortunately, defense experts often testify that such events are the true source of a plaintiff's injuries. But unless this testimony is based on "substantial evidence," it must be excluded from trial. (See *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548.) When deposing a defense expert, inquire into whether they believe that any of these ancillary issues were the cause of the plaintiff's injury, and then ask the basis for these opinions. This will help you address the specific alternate causation theories that should be precluded.

Evidence Code section 801, subdivision (b) states that an expert's opinion must be based on matters "perceived by or personally known to the witness or made known to him at or before the hearing." An expert may not base his or her opinion on speculation or conjecture. (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 338.) An expert's opinion may also be excluded if it is not shown to be reliable. (*People v. Price* (1991) 1 Cal.4th 324, 419-420.) Further, it is the law in California that it is misconduct to invite "juror speculation." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 957; *Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747.)

Kline v. Zimmer (2022) 79 Cal.App.5th 123, has briefly changed the landscape with regard to alternate causation. Under *Kline*, courts can admit less-than-probable evidence under the following rationale: "Less than a reasonable probability is a wide spectrum that begins at 50 percent likely and ends at impossible." (*Kline*, 79 Cal.App.5th, at p. 134.)

But *Kline* is not a blanket excuse for speculative evidence. For example, opinions based on "assumed facts" without any support for the truth of those facts will properly be excluded. (*Id.*, citing *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108.) Thus, trial courts continue to have discretion to determine the line between an opinion regarding a possible cause and mere speculation.

Fortunately, *Kline* will soon be making its exit. On July 16, 2023, Governor Newsom signed SB 652 into law, requiring expert opinion in a civil case to be based on the standard of a reasonable degree of probability in the expert's field of expertise. This bill adds

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2023

section 801.1 to the Evidence Code, abrogating the ruling in *Kline*:

> (a) Where the party bearing the burden of proof proffers expert testimony regarding medical causation and where that party's expert is required as a condition of testifying to opine that causation exists to a reasonable medical probability, the party not bearing the burden of proof may offer a contrary expert only if its expert is able to opine that the proffered alternative cause or causes each exists to a reasonable medical probability, except as provided in subdivision (b).
> (b) Subdivision (a) does not preclude a witness testifying as an expert from testifying that a matter cannot meet a reasonable degree of probability in the applicable field, and providing the basis for that opinion.

This law takes effect January 1, 2024. It will place plaintiff's experts and defense experts on a level field once again.

The *Sanchez* exclusion

It is critical, when deposing expert witnesses, to truly dive into not only all of their opinions, but the bases for – *and evidence supporting* – those opinions. Often, they will reveal information which, if properly briefed citing *Sanchez* and its progeny, can lead to exclusion of their testimony.

People v. Sanchez (2016) 63 Cal.4th 665, has been the subject of countless articles and thousands of trial court and appellate briefings. Practitioners know its basic tenet: "What an expert cannot do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez*, 63 Cal.4th, at p. 686.) What this means is that if the opposing party provides no foundation for a medical record, and fails to meet hearsay exceptions for its contents, then their expert cannot "backdoor" statements contained in those records through their own testimony. But more importantly – and this is something that is not directly addressed in *Sanchez* – if that record is the sole basis for an expert's particular opinion, then the expert's *opinion* must also be precluded from trial.

The following citation from *Sanchez* is often misused: "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury in *general terms* that he did so." (*Id*., at p. 685.) Opposing counsel may (and often do) rely on this citation as a basis for eliciting expert opinion that is based solely on case-specific hearsay. However, this tactic was addressed – and prohibited – in a decision two years after *Sanchez*:

> Appellant maintains that *Sanchez* does not preclude expert testimony based on medical records and police reports showing Miller was schizophrenic and had been aggressive in contacts with Florida police 20 years earlier because "an expert may still rely on hearsay in forming an opinion and may tell the jury he did so in general terms, with a hypothetical including case specific facts." What appellant proposes is not simply informing the jury "in general terms" what the expert relied on, however. Rather, by appellant's reasoning, *the exception would swallow the rule by allowing an expert to rely on case-specific hearsay under the fiction that it is not offered for its truth* – precisely what *Sanchez* prohibits. As the high court explained, "There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception."

(*People v. McVey* (2018) 24 Cal.App.5th 405, 417, emphasis added; see also *Jennings*, 114 Cal.App.4th at p. 1117 ["[A]n expert's opinion based on assumptions of fact without evidentiary support [], or on speculative or conjectural factors [], has no evidentiary value [] and may be excluded from evidence"].)

These cases illustrate that, if the basis for an expert's opinion consists solely of case-specific facts for which no foundation has been laid, then that expert's opinion must be precluded from trial.

Finally, under Evidence Code section 801, the trial court is to act as the gatekeeper to exclude speculative or irrelevant expert opinion. (*Sargon Enterprises, Inc. v. Univ. of S. Cal.* (2012) 55 Cal.4th 747, 770.) An expert opinion has no value if its basis is unsound. "Like a house built on sand, the expert's opinion is no better than the facts on which it is based." (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923; see also *Jennings*, 114 Cal.App.4th at p. 1117 ["[W]hen an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an "expert opinion is worth no more than the reasons upon which it rests"].)

Conclusion

Motions in limine are not about gaining an advantage over your opponent; they are about leveling the playing field for a fair trial. They should not be overlooked, but they should also not be overused. Utilize your motions to target the speculative and otherwise improper evidence that, if presented, would result in an unfair and prejudicial trial. With effective discovery, and especially effective depositions of defense experts, you will be prepared to streamline your trial and present only the relevant facts.

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